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Supreme Court, U.S.
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No. 01-1486

In The

Supreme Court of the United States

BEVERLY B. MANN,

Petitioner,

v.

THE UPJOHN COMPANY,

Respondent.

On Petition For Writ Of Certiorari To The Illinois Appellate Court, First District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

On the first day of trial, petitioner announced that she would not proceed with trial and requested that the court dismiss her case for want of prosecution. Immediately after the court dismissed the case, petitioner moved to vacate the dismissal.

The question properly raised by this petition is:

Did the Illinois Court of Appeals correctly affirm the circuit court's order refusing to vacate the dismissing of petitioner's case for want of prosecution when petitioner, despite five trial continuances, refused to try her case on its scheduled date?

CORPORATE DISCLOSURE STATEMENT

In June 1996 the name of respondent the Upjohn Company was changed to Pharmacia & Upjohn Company. Its parent company, a publicly-owned corporation chartered in Delaware, is Pharmacia & Upjohn, Inc.

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STATEMENT OF THE CASE

This petition arises from a judgment of dismissal for want of prosecution entered by the Circuit Court of Cook County at the request of petitioner Beverly Mann, a licensed attorney. Petitioner requested entry of judgment against her on the first day of trial and then immediately requested that the circuit court vacate the dismissal. When the court refused, petitioner appealed to the Illinois Court of Appeals arguing that the trial court somehow erred in not vacating the very relief she requested. The court of appeals affirmed and petitioner unsuccessfully sought review in the Illinois Supreme Court.

Although petitioner's claims took many forms, the underlying case involves state-law allegations of personal injury. Petitioner alleged that her use of Halcion® Tablets, an FDA-approved prescription sleeping medication manufactured by respondent The Upjohn Company, caused her a host of injuries. She sued Upjohn in 1991, voluntarily dismissed the case in June 1992, and refiled the action in October 1992.

The circuit court initially granted summary judgment in favor of Upjohn on the grounds that "plaintiff . . . presented no evidence to support her assertion that . . . the alleged breach proximately caused this plaintiff harm." Over Upjohn's objection, however, petitioner was granted leave to file an amended complaint alleging several new claims. The circuit court later dismissed one of the new claims for failure to state a claim for relief and granted summary judgment in favor of Upjohn on another claim.

As the first of many trial dates approached, petitioner was not prepared for trial. At the hearing on her first motion for continuance, the court repeatedly asked petitioner about the progress of her discovery efforts. The court postponed the trial for some eight months, warning petitioner that she had better use the additional time wisely:

> I'm going to do the case management order because I have some serious problems with whether or not you have done any discovery and whether or not you've made any arrangements to do discovery. . . . This is your last chance.

Vol. 3 C 609.

At two subsequent hearings on petitioner's motions to continue the trial date, the court repeatedly asked what discovery had she performed, and what was left to do. The court stated succinctly "My concern is what have you been doing in the last five years? . . . Let me ask you this. What discovery remains?" Vol. 18 C 4292. The court concluded:

> Based on everything I've heard and based on the orders that I have reviewed starting with April 24, 1996, all the way through June 12, 1997, it appears to me that plaintiff has not diligently prosecuted this case and has failed to establish good cause for the continuance requested, consequently, the motion to continue trial is denied.

Id. at 4323.

At a subsequent hearing, the court again tried to determine what petitioner had done to prosecute her

case. Vol. 24 C 29. ("I'm curious about what you have done and what you haven't done. I still haven't gotten an answer from you.") The court summarized its impressions of petitioner's efforts to prosecute her case:

> Can you understand though the concern that I have dealing with a case that was filed originally in 1991 . . . and now we are talking about '97? Do you understand my concern that *perhaps this may be a lawsuit that you think is never ready to be tried*?

Id. at 30-31 (emphasis added).

Once again, the court granted petitioner additional time to prepare her case, with another stern warning:

> Understand this, this case will be tried. I hope you're ready. Whether you are or not it will be tried. I am not going to accede to your request and continue this matter until early '98. I will grant you a 60 days continuance to October 21. That is all I can afford you.

Id. at 31-32.

Despite the court's admonition, the trial was later continued again, first to February and then to April 1998. The only penalty petitioner received was another lecture from the trial court:

> When you were first assigned to complex litigation the amount of discovery that occurred in this case was, at best, minimal. We have worked very diligently for the last 18 months to get this case ready for trial, and on several occasions you represented to the Court that you are ready to go. Now on the eve of starting the pretrial motions and getting the case substantively

> ready for the jury you're telling me you're not ready. This is in direct contradiction to what you have been representing to the Court for at least a year. And in anticipation that this problem was going to arise when I was assigned the case and I set the trial date I warned both counsel that this schedule was going to stay intact because of the amount of work that has already been done and the representations of both counsel that the work was completed. Now you're telling me it's not.

Vol. 25 C 137-38.

Shortly before the fifth scheduled trial date, petitioner moved for another continuance and announced that if she were not accommodated she would allow the court to dismiss the case for want of prosecution. On the morning of trial, petitioner refused to proceed and again invited the court to dismiss her case for want of prosecution:

> For the reasons stated in my motion for trial date continuance today, and stated in my motion for trial date continuance on Tuesday, and my written statements and my oral statements on that date, I am not prepared to proceed to trial. So I would assume that that means you will enter a dismissal for want of prosecution.
>
> * * *
>
> THE COURT: For the record, is plaintiff prepared to proceed to trial?
>
> MS. MANN: No, I am not.
>
> THE COURT: Will you be prepared to proceed to trial any time this afternoon?

> MS. MANN: No.
>
> THE COURT: This court then has no other recourse then if the plaintiff is [un]prepared and unwilling to proceed at trial [then] to dismiss the case. . . . This case is dismissed for want of prosecution.

Vol. 26 C 24-25.

A few minutes later, petitioner realized that she might be liable for Upjohn's costs if the case were indeed dismissed for want of prosecution. A 229. She then told the court: "I made a mistake when I said I couldn't prosecute. If I have to prosecute to avoid some kind of huge judgment against me for costs, I'll do it. We will go through the motions, okay." Vol. 26 C 34. The court refused to "rule on a motion to vacate a DWP I entered less than *five minutes ago.*" *Id.* at 37 (emphasis added).

On appeal, the Illinois Court of Appeals held that the circuit court did not abuse its discretion in denying petitioner's motions to vacate the dismissal for want of prosecution. Pet. App. C-1-C-12. The court stated: "In summary, the record in this case discloses a lack of cooperation by the plaintiff in obeying court orders, indifference to the court's advice and admonishments, repeated attempts to delay the proceedings, and a failure to follow the rules of proper procedure. Plaintiff was the architect of her own predicament, and her complaint now that she was denied substantial justice will not be heard by this court." Pet. App. C-11.

REASONS FOR DENYING THE WRIT

I. Adequate State Law Grounds Exist for Affirming the Judgment Below.

The Court should deny the petition for two fundamental reasons. First, petitioner's failure to clearly explain her position alone is grounds for denying the writ. Supreme Court Rule 14.4. Second, petitioner's request for review of the court of appeal's opinion presents no question worthy of the Court's attention. State-law grounds exist for affirming the judgment below, and petitioner's vague allegations of constitutional violations do not present a substantial federal question.

Under Illinois law, petitioner could not appeal the circuit court's order dismissing her case for want of prosecution because she invited the court to do so. *See Edward E. Gillen Co. v. Lake Forest*, 581 N.E.2d 739, 741 (Ill. App. 1991); *see also J. L. Simmons Co. v. Firestone Tire & Rubber Co.*, 483 N.E.2d 273, 278 (Ill. 1985) ("It is fundamental to our adversarial process that a party cannot claim error when it induces the trial judge's mistake.")

Accordingly, petitioner's sole remedy was to appeal the denial of her motions to vacate the dismissal. In Illinois, this issue is subject to the abuse of discretion standard of review. *In re Marriage of Sheber*, 459 N.E.2d 1056, 1061 (Ill. App. 1984). One of the factors the Illinois courts consider is whether the movant exercised due diligence in prosecuting the underlying case. *Marren Builders, Inc. v. Lampert*, 719 N.E.2d 117 (Ill. App. 1999).

Whether petitioner satisfied the state-law standards is outside the Court's jurisdiction. The circuit court made

factual findings that petitioner did not show diligence in preparing her case for trial. The court of appeals affirmed those factual findings in a well-reasoned opinion. The Court should defer to the Illinois courts' decision. *See Wolfe v. North Carolina*, 364 U.S. 177, 195 (1960) (" 'when, as here, there can be no pretense that the [state] Court adopted its view in order to evade a constitutional issue, and the case has been decided upon grounds that have no relation to any federal question, this court accepts the decision whether right or wrong.' " (Quoting *Nickel v. Cole*, 256 U.S. 222, 225 (1921)).

Petitioner's allegations that the Illinois courts violated her due process and equal protection rights are just that – allegations. The reality is that the courts cut through the blizzard of rhetoric unleashed by petitioner and reached a conclusion, based solely on state law, that petitioner had not shown diligence in preparing her case for trial and thus was not entitled to relief. Petitioner's dissatisfaction with the result does not make it a federal case.

Moreover, her complaints about a denial of substantive appellate review are illusory. The court of appeals spent twelve pages summarizing petitioner's obstructionist behavior and analyzing the propriety of the result reached by the circuit court. The Illinois Supreme Court's denial of further review is solely within that court's discretion. " '[I]t rests with each State to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise.' " *Wolfe*, 364 U.S. at 195 (quoting *John v. Paullin*, 231 U.S. 583, 585 (1913).

Although appearing *pro se,* petitioner is a licensed attorney in the State of Illinois. It should have come as no surprise to her that the court of appeals would consider her repeated failures to comply with the Illinois rules when reviewing the judgment of the circuit court.

Because the judgment below can be affirmed on state-law grounds, the instant petition presents no issues worthy of the Court's time and attention. *See, e.g., Hedgebeth v. North Carolina,* 334 U.S. 806, 807 (1948).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

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